Office - Supreme Court, U.S.
FILED
FEB 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-297

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

ARMCO, INC.

Appellant,

v.

DAVID C. HARDESTY, JR.
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether sufficient nexus exists with regard to the appellant's sales to West Virginia customers to allow West Virginia, consistent with Due Process Clause and Commerce Clause requirements, to impose its business and occupation privilege tax on appellant's in-State selling activities.

2. Whether the principles of the unitary business concept are appropriate in determining whether a corporation has entered a state in such a fashion that nexus with regard to any one of its activities may be determined based upon its overall in-state operations.

3. Whether the Commerce Clause prohibits a state from imposing a gross receipts tax on wholesale sales of property manufactured outside the state, where an exemption from the tax is provided with respect to the wholesale sales of property manufactured within the state, but a gross receipts tax on the manufacturing of those products subject to the exemption is imposed at a higher rate.

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BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST OF AMICUS CURIAE

This appeal involves the constitutionality, under the Due Process Clause of the Fourteenth Amendment and under the Commerce Clause, of the West Virginia business and occupation tax as applied to sales by Armco to West Virginia customers during the years 1970 through 1975. The Washington business and occupation tax (chapter 82.04 Wash. Rev. Code) is a gross receipts tax very similar to the West Virginia tax. Accordingly, the Court's decision in this appeal as to the permissible scope of the West Vir-

ginia tax may affect the scope of the Washington tax as well.

In this brief, however, we directly address only two of the product lines involved; *i.e.*, sales made by Armco's Steel Group and Union Wire Rope Group. For these first two product lines present most clearly, in our view, the major constitutional issues which are our concern.

STATEMENT OF THE CASE

The nature of the West Virginia tax, the description of the product lines, the methods by which Armco reaches its West Virginia market for these product lines, and the nature of Armco's other West Virginia business operations, together with a summary of the proceedings below, are all set forth at pages 3-5 of Armco's brief and need not be repeated here.

We would, however, supplement Armco's discussion of the proceedings below by showing the various legal theories adopted at each stage of the proceedings below. For these three theories are, in large part, the subject of this brief, and they provide the three alternative grounds on which the major issue in this case can be resolved.

(1)

On the administrative level, the West Virginia Tax Commissioner included within the tax base the two product lines which are the subject of this brief for reasons which he stated as follows:

> "The second issue for determination is whether sales made by the taxpayer's Steel Group and Union Wire Rope Group to West Virginia customers are properly subject to the business and occupation tax.
>
> "It is determined that these sales are properly subject to the business and occupation tax, and are, therefore, properly included in the present assessment. The taxpayer was 'engaging or continuing within this State in the business of selling any tangible property * * * *' as required by West Virginia Code § 11-13-2c during the audit period by the activity of its non-

resident salesmen in West Virginia. The taxpayer, through the efforts of its salesmen in-state, systematically solicited orders for the wholesale purchase of its products by West Virginia customers. This activity satisfies the requirements of Code § 11-13-2c because without the work engaged in by the salesmen in West Virginia these sales would not have transpired.

"Sufficient nexus to allow taxation of these transactions can also be found from the activity of the taxpayer's salesmen in West Virginia. These salesmen solicited orders in-state. In addition, they engaged in follow up activity which included the taking of succeeding orders and follow up calls on customers to check on their satisfaction with the taxpayer's products. All of these activities were carried out in a systematic and repetitive manner within West Virginia, and they are crucial to the development and maintenance of a market for the taxpayer's products in this State." Appendix C, J.S. 47a, 48a.

(2)

In reviewing the Commissioner's decision— solely upon the administrative record, with no further evidentiary hearing—the West Virginia Circuit Court rejected this theory of the Tax Commissioner. It held that the in-state activities of non-resident personnel were insufficient to provide the constitutionally required nexus. For this holding the Circuit Court relied primarily upon *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), stating that these in-state activities did not provide the "local grip on the seller" necessary to provide the required nexus, emphasizing the non-resident status of the sales personnel involved and distinguishing, on this basis, those cases in which resident personnel provided nexus through their in-state activities. Appendix B, J.S. 27a-29a.[1]

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[1]One of the cases so distinguished was *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975) which, as the Circuit Court correctly noted, involved a resident employee of the taxpayer. Appendix C, J.S. 29a.

A potential source of factual confusion arising from the Circuit Court's opinion should also be noted. That Court stated that about 77

(3)

The West Virginia Supreme Court of Appeals took a quite different approach from both that of the Tax Commissioner and that of the Circuit Court. It focused upon the West Virginia activities of other divisions of Armco, *i.e.*, the Mining Division and the section of the Metals Products Division which handled everything in the latter division's product line except metal buildings. As for these two parts of its West Virginia operations, Armco does not dispute the applicability of the West Virginia tax, since the Mining Division operates four in-state coal mines and the Metal Products Division operates an in-state sales office which handles everything in its product line except metal buildings.

Finding that these two parts of Armco's West Virginia operations formed a unitary business with all of its other West Virginia operations, the Supreme Court of Appeals reversed the Circuit Court and held that this provided sufficient nexus for all the other West Virginia operations as well, including those of the Steel Group and Union Wire Group.

INTRODUCTION AND SUMMARY

This appeal presents two distinct issues. The first we shall term the nexus issue, and the second the discrimination issue. Armco asserts, under the nexus issue, that its West Virginia sales of product lines involving only nonresident sales personnel do not have sufficient nexus with West Virginia to permit inclusion in the West Virginia tax base.

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percent of the West Virginia sales of two product lines here under discussion, steel and wire rope, were solicited at customers' headquarters located outside West Virginia. Appendix C, J.S. 26a. As correctly pointed in Armco's brief, however, this statement apparently has reference to the factual situation in 1976, which is outside the 1970-75 audit period. See Armco Br., page 5, note 2 and J.A. 17. Thus, this statement does not appear to negate the findings made by the Commissioner in his administrative order, as quoted above.

Alternatively, under the discrimination issue, Armco asserts that even if there is sufficient nexus, sales of these product lines must nevertheless be excluded from the tax base, because these product lines are manufactured outside West Virginia. And by its terms the West Virginia business and occupation tax reaches only sales of products manufactured outside the state, but not products manufactured within the state, thus supposedly resulting in an unconstitutional discrimination.

While we believe that the West Virginia Supreme Court of Appeals reached the correct result on both of these issues, we have difficulty with the route by which that court reached its result on the nexus issue. Thus, we do not believe it necessary—in order to find the required nexus for the transactions in question, to rely upon the unitary business theory. *Cf., Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980). Nor is it necessary to abandon the basic principle of *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), *i.e.*, the requirement that there be a nexus between the specific transactions to be included in the tax base and substantial in-state activities of the taxpayer.[2] For the required nexus is here supplied by the in-state activities of Armco's sales personnel. The proper approach, in short, was that taken by the Tax Commissioner in his administrative order.

The approach of the Tax Commissioner, we recognize, is inconsistent with *McLeod v. Dilworth*, 322 U.S. 327 (1944), and invites the Court to plow new ground—though (we would add) much less new ground than that plowed by the Supreme Court of Appeals. But the *McLeod* case, together with *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944) and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944), forms an important trilogy of decisions, close examination of which shows the analytical weakness of the result in *McLeod* and the analytical strength of the Tax Commissioner's approach.

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[2]On the other hand, we also disagree with the Circuit Court's application of *Norton*.

The framework for that latter approach also stems directly from the analysis found in the separate opinions of Mr. Justice Rutledge in all three decisions (concurring in *International Harvester* and *General Trading*, but dissenting in *McLeod*).

Under what we thus believe to be the correct framework, only the market state, and not the state of origin, is allowed to include in its tax base the gross proceeds from interstate sales of tangible property. This type of *allocation* to the market state is to be used for both gross receipts taxes and sales taxes. And accordingly, for both types of taxes, *apportionment* of the tax base between the state of origin and the market state through the use of an apportionment formula is both inappropriate and unnecessary.[3] Further, the standards for determining when the market state has sufficient nexus with the sales to include them in its tax base through the allocation process are the same for both sales taxes and gross receipts taxes. And the reason for thus treating these two types of taxes similarly is that the line between them is conceptually thin and in fact often non-existent.

This approach, which has in effect been applied by this Court in all gross receipts tax cases in the intervening forty years, puts into proper perspective the real question arising under the nexus issue: Can the constitutionally-required nexus be provided by the in-state activities of a taxpayer's employees even though they are non-residents assigned to an out-of-state office?

Regarding the discrimination issue, we believe that the court below was correct in concluding that the exist-

[3]Conversely, formulary apportionment becomes appropriate and often necessary, of course, for net income taxes and for sales or gross receipts taxes imposed upon sales of interstate services, such as interstate transportation. *Cf., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Allocation of the sort used for sales of tangible property simply does not work in these other contexts. What we here term "allocation" is sometimes referred to as "apportionment." See, *e.g., Standard Pressed Steel v. Department of Revenue of Washington*, 419 U.S. 560, 564 (1975). Because, however, it is essentially different from formulary apportionment, we use the term "allocation" throughout this brief.

ence of the West Virginia tax on manufacturers, at a rate even higher than that on wholesalers, removes any support for the claim that the tax on Armco is discriminatory. The controlling decision on this issue is *Hinson v. Lott*, 75 U.S. 148 (1869).

Armco's claim of discrimination, however, has another facet—involving potential, rather than actual discrimination—which can be more accurately described and thought of as a claim of potential multiple taxation. That potential discrimination arises from the possibility that another state, in which Armco manufactures some of the product lines involved in this appeal, might have a tax system identical to that of West Virginia. If such were the case, the cumulative tax burden on Armco, resulting from the combined taxes of both states, would be greater than the single tax—on manufacturing only—which West Virginia would impose if that manufacturing took place in West Virginia.

This facet of the claim is not new to this Court. It is essentially the same as that presented and rejected in *General Motors v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Washington Department of Revenue of Washington*, 419 U.S. 560 (1975). It was rejected on the ground, fully applicable here, that the mere possibility of such a hypothetical cumulative burden does not invalidate the tax.

Further, after *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977), it is doubtful that even such an actuality would constitute an unconstitutional discrimination. West Virginia's tax burden on Armco would *increase* if Armco were to move its manufacturing of the product lines in question into West Virginia. But *Boston Stock Exchange* shows that unconstitutional discrimination would exist if, and only if, such a move by Armco were to result in a *lower* West Virginia tax burden. And such, of course, is not the case at all under West Virginia's taxing system.

ARGUMENT

I. The Sales Taxed Herein Have the Required Nexus with West Virginia.

A. The Unitary Business Concept

The unitary business concept provides a method for solving a problem which is unique to the field of net income taxation, and involves the use of formulary apportionment. Simply put, the basic problem is that of determining which parts of a business are so closely related, interdependent, or integrated that they should all be considered as forming a single economic enterprise—to the total net income of which formulary apportionment should be applied. It thus involves the relationship between the in-state operations of a business and all out-of-state operations. It is based upon, and indeed implements, the same theory as that which justifies formulary apportionment in the first place; *i.e.*, the theory that separate accounting for each part of a single economic enterprise produces distorted results. See generally, Hellerstein and Hellerstein, *State and Local Taxation* (4th ed. 1978) 504-520.

The problem to which the unitary business concept is addressed, however, does not arise in the context of a gross receipts tax (such as the West Virginia business and occupation tax) or a sales tax, at least as applied to sales of tangible property. For formulary apportionment has never been required for such taxes. See, *e.g.*, *Norton Co. v. Dep't. of Revenue*, 340 U.S. 534 (1951), *General Motors v. Washington*, 377 U.S. 436 (1964), and *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975).

As shown by *Norton* and *General Motors*, however, gross receipts taxes may involve a problem which has a surface similarity to that involved in the unitary business concept. In determining whether sufficient nexus exists for the imposition of such a tax on the privilege of engaging in certain activities measured by gross receipts derived from

specific types of transactions, the relationship between those transactions and all *in-state* activities of the taxpayer must be examined. The purpose of this examination is to determine which, if any, of those in-state activities have a role in establishing and maintaining the market which gave rise to these transactions.

General Motors provides an illustration of this point. Among its operations, the taxpayer had a separate parts division (which had a warehouse in Portland, Oregon) from which sales were made to Washington automobile dealers. Although the parts division did not have its own sales staff to call upon these dealers, the automobile divisions (such as Chevrolet, Oldsmobile, and Pontiac) did have sales staffs performing this function. The in-state activities of these sales staffs, though directly involving only sales of automobiles to the dealers, certainly were an important factor in establishing and maintaining the market for the parts division. For without the sales of new cars, sales of parts to these dealers would obviously diminish or even disappear. Conversely, the operation of another warehouse of the parts division, located in Washington, was taken into account in determining whether sufficient nexus existed to tax the sales by the automobile divisions. For the improved service available by reason of this in-state warehouse undoubtedly assisted the taxpayer in its sales of new automobiles.

The parts division and the automobile divisions undoubtedly formed a unitary business. But this fact did not eliminate the need for the further inquiry: How were the Washington activities of each division related to those of the others with respect to establishing and maintaining the Washington market for each division's products?

In short, a determination that the various parts of an enterprise constitute a unitary business does not by itself supply the constitutionally required nexus.

Just as *General Motors* did not find nexus on the basis of the unitary business concept, neither did it repudiate, in our view, the basic approach to nexus issues estab-

lished in *Norton*. Rather, it applied that approach to a factual setting which was more complex than that in *Norton*, and found, within that setting, sufficient nexus for each of the specific types of transactions in controversy.

It is for these reasons that we disagree with the rationale for the result reached by the West Virginia Supreme Court of Appeals on the nexus issue. We are not suggesting, however, that the result itself was wrong. Instead, firmer underpinnings are available, such as those upon which the Tax Commissioner formulated the same result at the administrative level, and to which we next turn.

B. The In-State Activities of Armco's Steel Group and Union Wire Group Provide the Required Nexus.

In concluding that sales by Armco's Steel Group and its Union Wire Rope Group were properly included in the tax based, the West Virginia Tax Commissioner found as follows:

> "Sufficient nexus to allow taxation of these transactions can also be found from the activity of the taxpayer's salesmen in West Virginia. These salesmen solicited orders in-state. In addition, they engaged in follow up activity which included the taking of succeeding orders and follow up calls on customers to check on their satisfaction with the taxpayer's products. All of these activities were carried out in a systematic and repetitive manner within West Virginia, and they are crucial to the development and maintenance of a market for the taxpayer's products in this State." Appendix C, J.R. 47a, 48a.

These salesmen, however, did not operate out of West Virginia offices, or reside in West Virginia. Should this make a constitutional difference even though, as found by the Tax Commissioner, the in-state activities of these salesmen were "crucial to the development and maintenance of a market for the taxpayer's products in this State"?

From a purely factual standpoint *General Motors, supra*, and *Standard Pressed Steel, supra*, together with *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944) certainly do support the conclusion that it does make a difference. For *General Motors* and *Standard Pressed Steel*, resident personnel were involved, and their activities supplied, in whole or in part, the required nexus for the Washington business and occupation tax.[4] And in *McLeod*, on the other hand, the Court invalidated an Arkansas sales tax when only non-resident salesmen were involved.

This appeal, however, presents the opportunity to re-examine the questions of the constitutional necessity of using an in-state office or resident personnel. In turn, we submit, the argument for finding no such necessity is based upon practical realities. The fact that Armco's sales personnel come from across the border in order to do their work in West Virginia does not make that in-state work any less important and decisive in developing and maintaining the West Virginia market. And the Tax Commissioner, in effect, so found.

Mr. Justice Rutledge, in his dissent in *McLeod*, expressed a similar point:

> "* * * [F]or every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. * * *" 322 U.S. at 354.

The "relevant constitutional considerations" are discussed by Mr. Justice Rutledge in the remainder of his opinion, which was filed not only as a dissent in *McLeod*,

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[4] We say "in part" because in *General Motors*, the activities of non-resident personnel were also relied upon in finding the required nexus. See, 377 U.S. at 445-446. But the court was not there presented with the question of whether these activities, by themselves, would have been sufficient.

but as a concurrence in *General Trading Co. v. State Tax Comm'n.*, 322 U.S. 335 (1944) and *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944). Because of the analytical clarity of this opinion, and the light which it casts upon the relevant Due Process and Commerce Clause considerations and upon their relationship with each other, we reproduce the opinion from *McLeod* as an appendix to this brief. We here outline its major points.[5]

Under Mr. Justice Rutledge's analysis, the gross receipts tax involved in *International Harvester*, the sales tax involved in *McLeod*, and the vendor-collected use tax involved in *General Trading* should be considered as practical equivalents for constitutional purposes. 322 U.S. at 350, 362. Although the legal incidence of each tax was not the same—the legal incidence of a use tax being upon the buyer, that of a gross receipts tax being upon the seller, and that of a sales tax being upon either the buyer or seller—each tax had (and has) an equivalent practical effect of imposing a tax burden on sales transactions.[6]

When that sales transaction is an interstate sale, the constitutional problems which arise under both the Due Process Clause and the Commerce Clause are thus essentially the same for each type of tax.[7] The Due Process problem is to determine whether the taxing state has a sufficient connection with the transaction to justify imposition of the tax or collection obligation. But the answer to

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[5]Justice Rutledge's analysis is further developed in his concurring opinion in *Freeman v. Hewit*, 329 U.S. 249, at 259-283 (1946), upon which *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) places significant reliance in its important development of a modern, realistic framework for dealing with problems of state taxation of interstate business. See, 430 U.S. at 280, 288, n. 15.

[6]The practical divergence between the legal incidence of a tax and its economic burden has been considered by this Court in other contexts as well. *Cf., Washington v. United States*, ___ U.S. ___, 103 S.Ct. 1344 (1983).

[7]Mr. Justice Douglas, in his opinion for the majority in *International Harvester*, took this same approach in dealing with the nexus problems involved here. 322 U.S. at 345, 348, 349.

that problem may be that *both* the state of origin and the market state have a sufficient connection.

This, in turn, gives rise to the Commerce Clause problem. Should both states be allowed to tax? Or neither? Or only one? And if only one, which one? Or, as an alternative to all of these, should some sort of apportionment between the state of origin and the market state be required? See 322 U.S. at 357-360.

The proposed solution for this problem is to allocate the transaction solely to the market state. This not only avoids the possibility of two states each effectively imposing a tax on the same transaction, but also places "* * * the same tax load on both interstate and competing local business." 322 U.S. at 361.

Mr. Justice Rutledge's solution has been followed in subsequent decisions. Thus, the state of origin is completely precluded from imposing a gross receipts tax, a sales tax, or a use tax with respect to an interstate sale. See, *Evco v. Jones*, 409 U.S. 91 (1972).[8] Accordingly, no need exists for formulary apportionment between the state or origin and the market state; and such apportionment has not been required by this Court, as shown by *Norton*, *General Motors* and *Standard Pressed Steel*.

As also shown by these same cases, the question becomes whether the market state has sufficient nexus to include the interstate transaction within the tax base. If that state may not reach the transaction, no state may do so. Thus the nexus question is best thought of as a due process question, as Justice Rutledge thought of it, rather than as a commerce clause question. And what turns on that nexus question, as a practical matter, is whether *any* state may reach the interstate transaction.

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[8]One will not find in these subsequent decisions, such as *Evco*, an explicit statement that the state of origin is completely out of the running at the very start. But this has been, we believe, the practical effect of such decisions as understood by the various state tax administrators and state courts. See, *e.g.*, *Crown Zellerbach Corp. v. State of Washington*, 45 Wn.2d 749, at 755, 278 P.2d 305 (1954), so applying *Freeman v. Hewit*, 329 U.S. 249 (1946).

That is precisely what is involved in the nexus question presented here as well. If West Virginia may not reach, with a gross receipts tax, the sales transactions by the Steel Group and the Wire Rope Group, no state may do so.

In deciding whether West Virginia may do so, despite that lack of an office or any resident personnel, the determinative due process consideration should be, as suggested by Mr. Justice Rutledge, the nature and extent of Armco's in-state activities in soliciting and servicing its customers, and not where its personnel hang their hats. This was the controlling consideration in *General Trading*; but any differences between the vendor-collected use tax involved there and the gross receipts tax involved here are so slight, as a practical matter, that they should be insignificant for due process purposes.

Let us also make one final point regarding Mr. Justice Rutledge's analysis as applied to the question of the continuing vitality of *Norton*. The analysis assumes that, whatever the standards for finding adequate nexus might be, such nexus must be found for the specific transactions which the State is attempting to include in its tax base. We do not question the validity of that assumption, as applied to sales and gross receipts taxes—though the West Virginia Supreme Court of Appeals obviously did. As shown, however, by *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), this type of transactional nexus is not required with respect to a vendor-collected use tax. And in that respect, this Court has moved well beyond *General Trading*. But we are not suggesting that this Court should make a similar move with respect to a gross receipts tax. Nor do we believe Mr. Justice Rutledge's analysis would support such a move, despite its discussion of the practical equivalency between a gross receipts tax, a sales tax, and a vendor-collected use tax.

This is, of course, another way of saying that the basic approach of *Norton* should be retained, and that Mr. Jus-

tice Rutledge's analysis does not suggest otherwise.[9] If, however, the sales transactions which were excluded from the tax base in *Norton* had in fact involved in-state activities of the taxpayer's sales or service personnel (though they were non-residents operating from an out-of-state office) even without any connection with the taxpayer's other in-state operations, those sales transactions should have been included in the tax base. Indeed, that is the essence of our whole argument here.

II. The West Virginia Tax Does Not Discriminate Against Interstate Commerce.

The potential scope of the discrimination issue here addressed is broader than the nexus issue. For it involves *all* of Armco's West Virginia sales of products manufactured outside the state, including those as to which Armco concedes the existence of nexus and accordingly is not contesting tax liability.[10] Under Armco's discrimination argument, even sales to West Virginia customers from a West Virginia store or warehouse would be excluded from the tax base if the seller had also manufactured those products outside the state.

For the argument is that the exemption of in-state manufacturers from the wholesaling tax for products man-

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[9] The precise issue in *Norton*, which involved the Illinois retailers occupation tax, is now really moot in Illinois. For that tax, which was considered a gross receipts tax originally, has now attained the status of a typical sales tax. This is because of an increase in the rate, and the addition of a compensating use tax. See *United States v. Dept. of Revenue of Illinois*, 371 U.S. 21, aff'g 202 F.Supp. 757 (N.D. Ill. 1962). With the addition of this use tax, *National Geographic* and *Nelson v. Sears Roebuck and Co.*, 312 U.S. 359 (1941) would apply to the transactions found non-taxable in *Norton*. This development of the Illinois retailers occupation tax illustrates also the near impossibility of distinguishing between what is normally thought of as a gross receipts tax and what is normally thought of as a sales tax and the wisdom of Mr. Justice Rutledge in treating them as practical equivalents.

[10] The sales as to which nexus is conceded are all sales by the Metal Products division, other than sales of metal buildings. For these sales admittedly involved the utilization of a West Virginia office. Armco Br. 5.

ufactured and sold by them within the state is discriminatory. The supposed discrimination is against all taxpayers, such as Armco, who manufacture outside the state but make wholesale sales within the state, and accordingly do not receive the benefit of this exemption. And this supposed discrimination exists even though the in-state manufacturers who do receive the benefit of this exemption must pay a tax on their manufacturing operations which is more than triple that paid on wholesaling.[11]

Armco's argument has two distinct prongs, which we examine in turn.

A. The Wholesaling Tax is not Discriminatory When Viewed in Isolation From Other Jurisdictions.

If West Virginia had provided the exemption for wholesalers which Armco here complains of, but had not taxed manufacturing at all, or had taxed it at a lesser rate than the tax on wholesaling, an unconstitutional discrimination would unquestionably exist. But the tax on manufacturing removes that discrimination, as the Supreme Court of Appeals concluded.

The correctness of this conclusion was established over one hundred years ago in *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). *Hinson* involved a challenge to an Alabama statute imposing a tax of fifty cents per barrel on liquor introduced into Alabama for sale there. The challenge was brought by a dealer who had purchased his liquor from outside Alabama for sale within it. The Court stated that, standing alone, the tax would necessarily fall as discriminatory against interstate commerce. 75 U.S. at 150. But finding that a tax was also imposed upon all Alabama distillers of liquor, at the same rate of fifty cents per

[11] For both manufacturers and wholesalers, the tax base is the same, *i.e.*, gross proceeds from the sale of the goods. But the rate on manufacturing during the relevant period was 0.80 percent and later 0.88 percent, while the rate on wholesaling was 0.25 percent and later 0.27 percent (Armco Br. 3).

gallon, the court held that the tax on dealers of imported liquor did not violate the Commerce Clause, stating:

> "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States." 75 U.S. at 153.

So too here.[12]

Armco argues, however, that the West Virginia tax on manufacturers does not remove the discrimination. The argument, quite interestingly, is that the tax, rather than being too narrow, is instead too broad. For it applies, with no reduction in rate, even if the products manufactured are not subject to the wholesaling tax, and even if the products are sold by the manufacturer at the retail level in West Virginia, and are thus subject to the retailing tax. (Armco Br. 23, 24). Accordingly, it is argued, the tax on manufacturers should not be viewed as a substitute for the tax on wholesalers.

The argument is specious. Surely West Virginia's decision to tax its manufacturers to such a broad extent does not produce any sort of discrimination against Armco. For the fact remains that the wholesaling exemption of which Armco complains applies only to sales of products which

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[12] While the Court's subsequent opinion in *Walling v. Michigan*, 116 U.S. 446 (1886) cannot be fully reconciled with its decision in *Hinson*, the Court has continued to apply the holding of *Hinson* and its principle that the structure of the state's entire tax may be analyzed to determine the existence of discrimination. Thus, the Court has upheld compensating use taxes against a Commerce Clause challenge, characterizing its finding of equivalence in the tax burden wrought by the sales and use taxes as a "common sense conclusion." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). There the Court relied on both its decision in *Hinson* and its later holding, applying the *Hinson* principle, in *General American Tank Car Corp. v. Day*, 270 U.S. 369 (1926).

The decision in *Columbia Steel Co. v. State of Washington*, 30 Wn.2d 658, 192 P.2d 976 (1948) is contrary to *Hinson* and for that reason simply wrong.

have been subject to the higher manufacturing tax. That fact provides any necessary substitution. That the manufacturing tax applies to other products as well, to the detriment of the West Virginia manufacturers, is completely beside the point.

B. The Wholesaling Tax is not Discriminatory When Viewed in Conjunction With Other Jurisdictions.

The argument which we have just considered involves a claim of actual discrimination, arising solely from the effects of West Virginia's tax system alone. The discrimination argument we consider here, in contrast, involves a claim of potential discrimination, which would arise from the combined effects of two tax systems: that of West Virginia and that of another state should it also choose to adopt the same system as West Virginia. If Armco were subject to both states' systems, because it manufactured in one state and sold the products so manufactured in the other, the combined taxes would be greater than the tax imposed on Armco by West Virginia alone.

The possibility which Armco here envisions is merely that, and not an actuality. That same possibility exists under Washington's business and occupation tax, and was twice urged upon this Court as a ground for invalidating Washington's tax as applied to sales of products manufactured by the taxpayer outside Washington. The argument was rejected each time, on the rationale that the mere possibility will not suffice. See *General Motors*, 377 U.S. at 448, 449. See also *Standard Pressed Steel*, in which the Court relied upon *General Motors* in rejecting this same claim:

> " 'We noted in General Motors that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it. Id., at 449. The corporation made no such showing there.

Nor is any effect made to establish it here.' 419 U.S. at 593."[13]

Armco is here in the same position as the taxpayers in *General Motors* and *Standard Pressed Steel*. It can rely only on hypotheticals, and cannot show that in fact it suffers from the situation it envisions.

One further comment regarding that situation, however, may be useful. If the State in which Armco does its manufacturing imposed only a tax upon manufacturing, and not upon wholesaling at all—while the State in which Armco did its wholesaling imposed only a tax upon wholesaling, and not upon manufacturing at all—Armco would be faced, for all practical purposes, with the same situation as the one it complains of here. For the cumulative burden upon Armco would be greater than that upon an integrated manufacturer-wholesaler operating in one of those States alone.

In such a hypothetical situation, must one State give way to the other? And if so, which State should it be? The State of manufacture? Or the State of sale? Or should formulary apportionment between the two be required? These are more difficult questions than those arising when only sales activities, and not manufacturing activities, are involved. They should be resolved only when they are presented in an actual situation.[14] No such actual situation

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[13] In both *General Motors* and *Standard Pressed Steel*, the Court phrased the question in terms of possible multiple taxation, rather than possible discrimination. But the question is the same, whichever way it is phrased. It should also be noted that three justices dissented from this portion of the *General Motors* holding (377 U.S. at 460) but none from the *Standard Pressed Steel* holding.

[14] The same basic questions can arise in other contexts. For example, the production of coal might be taxed by a severance tax, as in *Commonwealth Edison v. Montana Co.*, 453 U.S. 609 (1981) and the consumption of that same coal in another State might be subject to a use tax. Similar questions can also arise in the context of a net income tax, as in *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425, 444. The taxpayer there argued that Vermont should not be allowed to include dividend income in the tax base to be apportioned by Vermont under formulary apportionment because of the State of the taxpayer's corporate domicile, New York, might decide to allocate to itself all of the

existed in *General Motors* and *Standard Pressed Steel* and accordingly the Court did not address these questions. For the same reason, they need not be addressed here.

Lastly, even the hypothetical situation envisioned by Armco is completely different from those situations involved in this Court's recent decisions in which it has found state tax systems to be discriminatory.

> "* * * We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases. See, e.g., Maryland v Louisiana, 451 US 725, (1981); Boston Stock Exchange v State Tax Comm'n, 429 US 318 (1977); * * * " *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981).

If West Virginia had imposed upon an integrated manufacturer-wholesaler operating solely in West Virginia a *lesser* tax burden than that imposed upon an integrated manufacturer seller, such as Armco, which sells in West Virginia but manufactures outside the State, the constitutional vice found in *Boston Stock Exchange* and *Maryland v. Louisiana* would be present here as well. But in fact West Virginia does the exact opposite.

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taxpayer's dividend income. And this, of course, would produce a type of multiple taxation of the same dividends. The Court rejected the argument, stating:

> "* * * We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy. But the absence of any existing duplicative tax does alter the nature of appellant's claim. Instead of seeking relief from a present tax burden, appellant seeks to establish a theoretical constitutional preference for one method of taxation over another. * * *" 453 U.S. at 444.

The Court thus disposed of the taxpayer's argument in essentially the same way that it disposed of the potential multiple taxation arguments in *General Motors* and *Standard Pressed Steel*.

CONCLUSION

For the reasons given above, the decision of the West Virginia Court of Appeals with respect to the application of the West Virginia Tax to Armco's Steel Group and Union Wire Group should be affirmed.

Respectfully submitted,

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APPENDIX

Opinion of Mr. Justice Rutledge [concurring in *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944) and *International H. Co. v. Dept. of Treasury*, 322 U.S. 340 (1944); and dissenting in *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944)] 322 U.S. at 349.

These three cases present in various applications the question of the power of a state to tax transactions having a close connection with interstate commerce.

In No. 311, *McLeod* v. *J. E. Dilworth Co.*, *ante*, p. 327, Arkansas has construed its tax to be a sales tax, but has held this cannot be applied where a Tennessee corporation, having its home office and place of business in Memphis, solicits orders in Arkansas, by mail, telephone or sending solicitors regularly from Tennessee, accepts the orders in Memphis, and delivers the goods there to the carrier for shipment to the purchaser in Arkansas. This Court holds the tax invalid, because "the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." Though an Arkansas "use tax" might be sustained in the same situation, "we are not dealing with matters of nomenclature even though they be matters of nicety." And the case is thought to be different from the

Berwind-White case, 309 U. S. 33, where New York City levied the tax, because, in the Arkansas court's language, "the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ."

On the other hand, in No. 441, *General Trading Co.* v. *State Tax Commission, ante*, p. 335, Iowa applies its "use tax" to a transaction in which a Minnesota corporation ships goods from Minnesota, its only place of business, to Iowa purchasers on orders solicited in Iowa by salesmen sent there regularly from Minnesota for that purpose, the orders being accepted in Minnesota. This tax the Court sustains. While "no State can tax the privilege of doing interstate business, . . . the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. . . . None of these infirmities affects the tax in this case. . . ." And the foreign or nonresident seller who does no more than solicit orders in Iowa, as the Tennessee seller does in Arkansas, may be made the state's tax collector.

In No. 355, *International Harvester Co.* v. *Dept. of Treasury, ante*, p. 340, the state applies its gross income tax, among other situations, to one (Class D) where a foreign corporation authorized to do and doing business in Indiana sells and delivers its product in Indiana to out-of-state customers who come into the state for the transaction. The Court sustains the tax as applied.

I.

For constitutional purposes, I see no difference but one of words and possibly one of the scope of coverage between the Arkansas tax in No. 311 and the Iowa tax in No. 441.

This is true whether the issue is one of due process or one of undue burden on interstate commerce. Each tax is imposed by the consuming state. On the records here, each has a due process connection with the transaction in that fact and in the regular, continuous solicitation there. Neither lays a greater burden on the interstate business involved than it does on wholly intrastate business of the same sort. Neither segregates the interstate transaction for separate or special treatment. In each instance therefore interstate and intrastate business reach these markets on identical terms, so far as the effects of the state taxes are concerned.

And in my opinion they do so under identical material circumstances. In both cases the sellers are "nonresidents" of the taxing state, foreign corporations. Neither seller maintains an office or a place of business there. Each has these facilities solely in the state of origin. In both cases the orders are taken by solicitors sent regularly to the taxing state for that purpose. In both the orders are accepted at the home office in the state of origin. And in both the goods are shipped by delivery to the carrier or the post in the state of origin for carriage across the state line and delivery by it to the purchaser in his taxing state.

In the face of such identities in connections and effects, it is hard to see how one tax can be upheld and the other voided. Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that "title passes" on delivery to the carrier in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that

factor alone is a will-o'-the-wisp, insufficient to crux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.

The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a "sales tax." Iowa calls hers a "use tax." This court now is committed to the validity of "use" taxes: *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. Similarly, "sales taxes" on "interstate sales" have been sustained. In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, such a tax applied by the state of the market was upheld. Compare *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169. Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. The difference may be important for the scope of the statute's application, that is, whether it is intended to apply to some transactions but not to others that are within reach of the state's taxing power. It hardly can determine whether the power exists.

II.

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes place upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. *e. g., Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue." But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state,

the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state."[1] The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

That is true, if labels are not to control, unless something which happens or may happen outside the taxing state operates in the one case to defeat the jurisdiction, but does not defeat it in the other.

As I read the Court's opinion, though it does not explicitly so state, the Arkansas tax falls because Tennessee could tax the transaction and, as between the two states, has exclusive power to do so. This is because "the sale—the transfer of ownership—was made in Tennessee."

[1] Cf. *Frese* v. *Louisville Cement Co.*, 134 F. 2d 511 (App. D. C.).

Arkansas' relation to the transaction is constitutionally different from that of New York in the *Berwind-White* case, though both are the state of the market, because the Berwind-White Company "maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City." This "constituted a sale in New York and accordingly we sustained a retail sales tax by New York." So here the company's "offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce. . . ." The inevitable conclusion, it seems to me, is that the Court is deciding not only that Arkansas cannot tax the transaction, but that Tennessee can tax it and is the only state which can do so. To put the matter shortly, Arkansas cannot levy the tax because Tennessee can levy it. Hence "for Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

This statement of the matter appears to be a composite of due process and commerce clause ideas. If so, it is hard to see why the same considerations do not nullify Iowa's power to levy her tax in the identical circumstances and vest exclusive jurisdiction in Minnesota to tax these transactions. For in the Iowa case the selling corporation maintains its office and place of business in Minnesota, accepts the orders there, and the delivery, which is to carrier or post, is consummated, so far as the record shows, exactly in the manner it is made in the Tennessee-Arkansas transaction. If these facts nullify Arkansas' power to tax the transaction by vesting exclusive jurisdiction in Tennessee, it would seem *a fortiori* they would nullify Iowa's power and give Minnesota exclusive jurisdiction to tax the transactions there involved. Unless the sheer difference in the terms "sale" and "use," and whatever difference these might make as a matter of legislative selec-

tion of the transactions which are to bear the tax, are to control upon the existence of the power to tax, the result should be the same in both cases.

Merely as a matter of due process, it is hard to see why any of the four states cannot tax the transactions these cases involve. Each has substantial relations and connections with the transaction, the state of market not less in either case than the state of origin. It "sounds better" for the state of origin to call its tax a "sales tax" and the state of market to name its tax a "use tax." But in the *Berwind-White* case the latter's "sales tax" was sustained, where it is true more of the incidents of sale conjoined with the location of the place of market than do in either No. 311 or No. 441. If this is the distinguishing factor, as it might be for selecting one of the two connected jurisdictions for exclusive taxing power, it is not one which applies to either of these transactions. The identity is not between the *Dilworth* case and *Berwind-White*. It is rather between *Dilworth* and *General Trading*, with *Berwind-White* differing from both. And, so far as due process alone is concerned, it should make no difference whether the tax in the one case is laid by Arkansas or Tennessee and in the other by Iowa or Minnesota. Each state has a sufficiently substantial and close connection with the transaction, whether by virtue of tax benefits conferred in general police protection and otherwise or on account of ideas of territorial sovereignty concerning occurrence of "taxable incidents" within its borders, to furnish the due process foundation necessary to sustain the exercise of its taxing power. Whether it exerts this by selecting for "impingement" of the tax some feature or incident of the transaction which it denominates "sale" or "use" is both illusory and unimportant in any bearing upon its constitutional authority as a matter of due process. If this has any substantive effect, it is merely one of legislative intent in selecting the transactions to bear the tax and thus

fixing the scope of its coverage, not one of constitutional power. "Use" may cover more transactions with which a state has due process connections than "sale." But whenever sale occurs and is taxed the tax bears equally, in final incidence of burden, upon the use which follows immediately upon it.

The great difficulty in allocating taxing power as a matter of due process between the state of origin and the state of market arises from the fact that each state, considered without reference to the other, always has a sufficiently substantial relation in fact and in tax benefit conferred to the interstate transaction to sustain an exertion of its taxing power, a fact not always recognized. And from this failure, as well as from the terms in which statutes not directed specifically to reaching these transactions are cast, comes the search for some "taxable incident taking place within the state's boundaries" as a hook for hanging constitutionality under due process ideas. "Taxable incident" there must be. But to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not "tax an interstate transaction" is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separated from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that one fact alone a relation to the whole transaction so substantial as to nullify any due process prohibition. Whether the tax is levied on the "sale" or on the "use," by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction. Nothing in due process requirements prohibits either state to levy either sort of tax on such transactions. That Tennessee therefore may tax this transaction by a sales tax does not, in any proper conception of due process, deprive Arkansas of the same power.

III.

When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55–56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton* v. *Missouri*, 91 U. S. at 275; *Guy* v. *Baltimore*, 100 U. S. 434; *Voight* v. *Wright*, 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.[2]

In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or

[2] Cf. the opinion of the Chief Justice in *Northwest Airlines* v. *Minnesota*, *ante*, p. 308.

"use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.

The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a "use" tax and Tennessee and Minnesota a "sales" tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names, relevant to the problem created by the commerce clause, though not to that of "jurisdiction" under due process conceptions. And the difference would be no less substantial if the taxes levied by both the state of origin and that of market were called "sales" taxes or if, indeed, both were called "use" taxes.

The Iowa tax in No. 441 avoids this problem by allowing credit for any sales tax shown to be levied upon the transaction whether in Iowa or elsewhere. Clearly therefore that tax cannot in fact put the interstate transaction at a tax disadvantage with local trade done in Iowa or elsewhere.[3]

However, the Arkansas tax in No. 311 provides for no such credit. But in that case there is no showing that Tennessee actually imposes any tax upon the transaction.

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[3] Cf. text *infra* at note 4 *et seq.*

If there is a burden or clog on commerce, therefore, it arises from the fact that Tennessee has power constitutionally to impose a tax, may exercise it, and when this occurs the cumulative effect of both taxes will be discriminatorily burdensome, though neither tax singles out the transaction or bears upon it more heavily than upon the local trade to which it applies. In short, the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.

In my opinion this is the real question and the only one presented in No. 311. And in my judgment it is determined the wrong way, not on commerce clause grounds but upon an unsustainable application of the due process prohibition.

Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.

As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts.

That the decision is cast more largely in terms of due process than in those of the commerce clause does not nullify that effect.

If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin.[4] The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business. Hence, if the risk of taxation by both states may be said to have the same constitutional consequences, under the commerce clause, as taxation in actuality by both, the Arkansas tax, rather than the power of Tennessee to tax, should stand.

It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for applica-

[4] Cf. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909; Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617; compare *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307.

tion of the commerce clause prohibition. Risk of course is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent. But in these situations it may be doubted, on entirely practical grounds, that the mere risk Tennessee may apply its taxing power to these transactions will have any substantial effect in restraining the commerce such as the actual application of that power would have. In any event, whether or not the choice must be made now or, as I think, has been made, it should go in favor of Arkansas, not Tennessee.

For all practical purposes Indiana's gross income tax in No. 355 may be regarded as either a sales tax or a use tax laid in the state of market, comparable in all respects (except in words) to the Arkansas tax laid in No. 311 and to the Iowa tax imposed in No. 441, except that here the seller as well as the buyer does business and concludes the transaction in Indiana, the state of the market. This is clearly true of Classes C and E. It is true also of Class D, in my opinion, although the buyer there resided in Illinois but went to Indiana to enter into the transaction and take delivery of the goods. That he at once removed them, on completion of the transaction there, to Illinois, intended to do this from the beginning and this fact may have been known to the seller, does not take from the transaction its character as one entered into and completed in Indiana. Whether or not Illinois, in these circumstances, could impose a use tax or some other as a property tax is not presented and need not be determined. If the Arkansas and Iowa taxes stand, or either does, *a fortiori* the Indiana tax stands in these applications.

Accordingly, I concur in the decisions in Nos. 441 and 355, but dissent from the decision in No. 311.